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Mr. Chairman and distinguished members, thank you for having this hearing today, during the week that Americans are celebrating as Sunshine Week. I'm reminded of that fundamental point made by a Princeton professor named Woodrow Wilson in his landmark study titled *Constitutional Government*, published in 1885. Wilson remarked that "*The informing function of Congress should be preferred to its legislative function. The argument is not only that discussed and interrogated administration is the only sure and efficient administration, but more than that, that the only really self-governing people is that people which discusses and interrogates its administration.*"

Of course, Mr. Wilson changed his mind once he got to the White House. But that's another story.

We are here today to discuss and interrogate our government about two of what I'd call "Houston, we got a problem" problems. One of them is the fact that securocrats have been scouring the open shelves of the National Archives for 50-year-old documents they can stamp secret again. We know some of the dimensions of the

problem: 40 million plus pages reviewed, and 55,000 pages of previously open records shoved back into the vault.

At least we have numbers here. For the other "Houston, we got a problem," we don't even know how big and bad it is. Government agencies are slapping new unclassified markings on records, like "Sensitive But Unclassified" or "Sensitive Security Information" or "Limited Official Use" and no one really knows how many records are covered, or for how long, and there are practically none of the limits that we do have in the security classification world.

I don't want to say we have figured out how to run a classification system. Despite the best efforts of public servants like William Leonard, the evidence you have produced in these hearings, Mr. Chairman, shows that we are far from any kind of rational, efficient, cost-effective, credible security classification system. You pressed one of Secretary Rumsfeld's deputies over and over on the question of how much over-classification there is, and she finally conceded that it was a "50-50" problem. Other folks who know have even higher estimates, like Governor Tom Kean, who read the latest Bin Ladin and counterterrorism information while he was head of the 9/11 commission, and said afterwards that 75% of what he saw that was classified should not have been.

And this is in a system that has checks and balances. There are government-wide standards for classifying, in statutes like the Atomic Energy Act and in the key Executive Order (12958 amended by 13292). There is an audit agency, the Information Security Oversight Office, reporting annually to the President and the public. There is the Interagency Security Classification Appeals Panel, ISCAP, which has brought far more rigor to the agencies' judgments over what should be classified and what should not. There are cost data, gathered by the Office of Management and Budget as ordered by Congress, totaling more than seven billion dollars last year. There are court cases, which rarely overrule government claims, but always provide a venue that forces additional review, and usually, additional documents to be released.

In the sensitive unclassified information field, there are no such checks and balances. After last year's hearing, Mr. Chairman, you asked one of the witnesses, Admiral McMahon of the Department of Transportation, how many times DOT had labeled records "for official use only" or similar designations. The Admiral wrote back, "During the period in question, we did not keep records of restricted information designations other than national security classifications." He reported only two uses of the "sensitive security information" label since DOT had begun keeping records on that in January 2005. (Maybe keeping records had a downward effect on how often the stamp was applied.) But on "for official use only," "we have no record of how many times."

I want to applaud this Subcommittee, Mr. Chairman, for commissioning the Government Accountability Office to study this problem. The GAO study of the Transportation Security Administration and its new "Sensitive Security Information" policy, completed in June 2005, found that "accountability and consistency" were lacking and that "clear policies and oversight" were needed. The new GAO study released at today's hearing shows that the Energy Department and the Defense Department had policies on "official use only" but lacked clarity in those policies, lacked training requirements, and lacked oversight to make sure the markings were appropriate and consistent.

The GAO's findings, and the testimony of knowledgeable officials like William Leonard of ISOO, move us towards some better, if not yet best, practices on handling sensitive unclassified information.

My own organization, the National Security Archive at George Washington University, has developed our own particular way to study government behavior. We file Freedom of Information Act requests, then compare what comes back – a Freedom of Information Audit. Sometimes we wait years – our latest audit of federal backlogs on Freedom of Information requests shows that some agencies have stalled so long that the requests would be old enough for drivers' licenses in most states.

We decided to look at the sensitive unclassified information issue back in 2002 when we came up with surprising results from an Audit. We had asked agencies how they responded to the infamous memo from Attorney General Ashcroft in October 2001 declaring the end of the discretionary release. Mr. Ashcroft told agencies, if you can find any exemption to claim, we'll back you up. We found very diverse responses across the government, ranging from a few agencies who saw the memo as a "radical change" for FOIA, all the way to a few agencies who asked us, "What Ashcroft memo? Could you send us a copy?" But many agencies mentioned another memo altogether as the key order they were following to scale back public information.

This was the so-called Card Memo, authored by White House Chief of Staff Andrew Card in March 2002, right after a front page story in the *New York Times* reported the government was still making publicly available "formerly secret documents that tell how to turn dangerous germs into deadly weapons." The Card Memo, together with an attached joint memo from ISOO and the Justice Department, directed agencies to take a hard look at how they were identifying and protecting information relating to weapons of mass destruction, including chemical, biological, radiological and nuclear weapons.

We sent Freedom of Information Act requests to each of 35 major federal agencies in January 2003 for copies of their responses to the Card Memo. Only the CIA and AID have failed to answer, three years later. Overall, the Card Memo had precisely the advertised effect: 10 agencies reported removing material from their Web sites, and 16 provided documents showing increased emphasis on using exemptions to the Freedom of Information Act. But 9 agencies told us they had no responsive documents – is it possible that they failed to report back as required to Mr. Card or to the Department of Homeland Security?

I do want to point out that a number of the agency changes in response to the Card Memo were entirely reasonable. Some agencies established task forces that developed clear criteria for what should be posted on the Web and what should not. Some agencies used the review to enhance their cyber-security and firewall

protections. Two agencies – the Environmental Protection Agency and the Department of Defense – even took the opportunity to remind employees to recognize both the risks and benefits of the free exchange of information.

But the Card Memo audit flagged for us the remarkably wide range of agency initiatives focused on protecting sensitive unclassified information – what William Leonard has called a "patchwork quilt" of guidelines and procedures and practices. Our next step was to file Freedom of Information requests about those agency policies. No one could tell how many documents were being marked with sensitive unclassified markings, but surely we could count the number of agency policies, find out on what authority they were based, and get some real comparative data on what they had in common and what was different.

So in February 2005, the month before this Subcommittee held its hearing on "Pseudo-Classification," as the Chairman has memorably named the phenomenon, we filed Freedom of Information requests with 43 agencies for their directives, training materials, guides, memoranda, rules and regulations on sensitive unclassified information. We now have results, through answers to our requests and from on-line research in agency Web sites, for 37 agencies across the federal government.

Those are the results we are releasing today, here at this hearing, and on our web site at www.nsarchive.org. Our title borrows from your own, Mr. Chairman: "*Pseudo-Secrets: A Freedom of Information Audit of the U.S. Government's Policies on Sensitive Unclassified Information.*" I appreciate the Subcommittee's including the full report in today's hearing record. And I must give credit where credit is due: This report is the work of extraordinary persistence in filing Freedom of Information requests and following them up, carried forward on the Card Memo by Barbara Elias, the tenacious director of our Freedom of Information Project, and on agency policies by Kristin Adair, our able Freedom of Information Associate, who also prepared the several drafts of this report. Archive general counsel Meredith Fuchs directed the entire effort

over the past three years and served as executive editor of the report.

In those 37 major federal agencies, our Audit found:

- 28 different, distinct policies on sensitive unclassified information with little, if any, coordination between agencies.
- No agency monitors or reports on the use or impact of these sensitive unclassified information policies.
- Only 8 agencies' policies are authorized by statute and implemented by regulation.
- No challenge or appeals mechanism for questioning the markings exists in any of the policies.
- Only one policy contains a "sunset" provision for the sensitive unclassified markings – at the Agriculture Department – but the maximum duration of 10 years is the same as for Top Secret information in the classification system.
- 8 agencies effectively allow any employee to slap protective markings on records, including the largest single department other than Defense, Homeland Security (more than 180,000 employees).
- Only 7 policies include cautions or qualifiers against using the markings to conceal embarrassing, illegal or inefficient agency actions (in the classified system, this is an explicit prohibition).
- 11 agencies report no policy on sensitive unclassified information (these agencies may use "official use only" and similar markings, but not – apparently – to protect information that is sensitive because of its security implications, which was the core of our Audit).

You can draw your own conclusions, but we believe that the diversity of policies, the ambiguous and incomplete guidelines, the lack of monitoring, and the decentralized administration of information controls on sensitive unclassified information – all of which is evident in our Audit results – means that neither the Congress nor the public can really tell whether these sensitive unclassified information policies are actually working to safeguard our security, or are being abused

for administrative convenience or coverup. So what do we recommend?

First, let's get some hard numbers. How many officials can apply these markings? How many records are they marking? How often do these markings affect releases (or withholdings) under the Freedom of Information Act? We have this kind of data for the formal security classification system, thanks to ISOO's tracking and sampling and data collection; and the first step towards reform of the pseudo-secrecy system is to get a handle on the numbers.

Second, let's set some limits, not just on the number of officials who can apply the stamps, although that would be a good start. Every agency needs a mechanism for both insiders and outsiders to challenge the pseudo-secret markings and appeal agency use of such restrictions. Every marking needs a sunset, a limited duration.

Third, let's make some rules across all the agencies. For one, the rules need to prohibit using pseudo-secret markings to cover evidence of maladministration, malfeasance, or embarrassment. For another, the rules need to detail the criteria that agencies should use before they can apply such markings, along with uniform handling and protection standards.

There is much more in our report on Pseudo-Secrets, including detailed Appendices with agency-by-agency breakdowns. I look forward to working with this Subcommittee, with you, Mr. Chairman, and with our colleagues at GAO and ISOO, as all of us struggle with this enormous problem.

In the meantime, we have another problem we're working with ISOO to clean up. You asked me to say a few words about this front-page story, how government reviewers out at the National Archives have been pulling previously open records off the shelves and reclassifying them. I know the agencies claim this is not reclassifying, just their correction of previous inadvertent and mistaken releases, but call it what you want, I call it counterproductive, destructive to the credibility of the information security system overall, and all too

telling about the current spate of secrecy mania we're seeing in the federal government.

My own staff had come across this phenomenon of reclassification probably a dozen times in the last few years. Archival boxes at the National Archives in College Park that we had looked at a few years back, now filled with withdrawal sheets instead of the documents. But so many disparate collections were involved – Mexico, Soviet Union, nuclear proliferation, Cuba, and more – that we blamed the other various re-review programs that have been going on since 1998.

The Department of Energy was the first to take on the task of putting toothpaste back in the tube. Partly because of the controversy over alleged Chinese spying in the 1990s, up to and including the Wen Ho Lee case, Energy started re-reviewing documents that had already been released. Energy found – in the immortal Washington phrase – "mistakes were made." Congress responded with the Kyl-Lott amendment in 1998 setting up a formal re-review process with actual budgets and regular reporting. Over the years, this effort has pulled more than 5,000 pages of documents containing what Energy describes as Restricted Data and Formerly Restricted Data related to nuclear weapons. Skeptics including William Leonard's predecessor at ISOO, Steve Garfinkel, have described the process as a waste of taxpayers' money, since the vast majority of pages pulled from the files have no information that would actually aid a terrorist or a would-be proliferators, but rather contain location information for U.S. nuclear deployments abroad during the Cold War.

Skeptics to the contrary notwithstanding, the rest of the bureaucracy looked on with awe at Energy's success. Money from Congress to take over control of government-wide declassification? Now we know that is what the intelligence agencies pioneered starting in 1999, based on their finding "mistakes" in the release of State Department intelligence bureau documents. Of course, most of the mistakes were of the "nobody asked me" variety; the CIA and other intelligence agencies wanted their say, and the current agency-

centric rules require referrals to the point of an almost-endless daisy chain of review and re-review.

The intelligence re-review seems to have escalated in its reach after 2001. Possibly a major encouragement came from President Bush's executive order in November 2001 giving former Presidents and (for the first time) former Vice-Presidents the power to stall indefinitely on release of their White House records – even though the law actually gave that authority to the Archivist of the United States. Seeing the National Archives get rolled bureaucratically by the White House certainly did not signal the spy agencies to restrain themselves and focus their attention on fighting terrorism rather than re-fighting the Cold War and reclassifying the old files.

We might never have connected the dots without Matthew Aid, that enterprising historian of intelligence. His testimony will explain how he did it, but as soon as he came to us, the light bulb went on. His examples of idiotic secrecy were what journalists call TGTC – too good to check – but Matthew had checked them all out.

Let me read you one. This is one of the documents that is now missing from the boxes on the shelves, all that's left in the box is a sheet that says "withdrawn" – sorry, it's a secret.

The document reports that if you're dropping propaganda by balloons over enemy territory, don't do it in winter because of "increased risk in launching due to unfavorable ground conditions; less favorable wind conditions which may result in depositing the load over neutral territory, and considerably less effect in the target areas due to difficulty of finding the leaflets on snow-covered ground."

I have to warn you, Mr. Chairman, according to the number 2 fellow at the Justice Department today, Paul McNulty, you are in legal jeopardy right now. Everyone in this room is now in unauthorized possession of classified information. Mr. NcNulty has said such unauthorized possession is a criminal violation of the Espionage Act. Doesn't matter that it's 50 years old. Doesn't matter that they can't prove any damage to U.S. national security. Doesn't matter that

you're a Congressman or you're a journalist or you're a citizen. Mr. McNulty said – and a federal judge named T.S. Ellis III astonishingly agreed – "anyone" who comes into unauthorized possession of classified information is liable for criminal prosecution.

That's the government's excuse for prosecuting two lobbyists from the American Israel Public Affairs Committee for receiving (through their ears) classified information about Iran. Anybody who read the *Washington Post* yesterday (13 March 2006) is now in possession of more highly classified information about Iran than anything those AIPAC lobbyists were told. And right now, here in Washington and around this country, FBI agents who should be chasing Osama bin Ladin's buddies are chasing journalists and career public servants who just blew some whistles. This approach is an invitation to selective prosecution and abuse of power.

I strongly suspect that the bureaucratic takeover by CIA out at the National Archives, assisted by the other intelligence agencies, comes from the same obscure insiders who are pushing the official secrets act and the AIPAC prosecution and, like CIA director Porter Goss, would like to see journalists hauled into court about their reporting of national security matters that CIA would prefer to keep in the dark.

The CIA has the money to take over the declassification process like this, and hardly ever experiences a debate about how much it is spending, because the CIA budget is secret, and doesn't go through the bargaining process that the National Archives has to suffer with. The CIA also has the National Security Act of 1947 with a mandated shroud over sources and methods, with no cost-benefit requirement or prohibition on using that claim to cover up criminality, embarrassment, or inaccuracy. Compare that inadequate language to the restrictions President Bush has maintained in his Executive Order on classification. So sources like Manuel Noriega have used their cover and apparent protection to aggrandize power, smuggle drugs and murder opponents. Sources like the Guatemalan colonel Alpirez have used their cover and protection to cover up the murder of an American citizen. Sources like the now-infamous Curveball

pitched lies about Iraq weapons of mass destruction and the secrecy kept challengers and fact-checkers at bay.

The credibility of the classification system is at issue here. When the security system itself loses that credibility, we lose our ability to protect our real secrets. When even the mundane is classified, we're applying the two-edged sword of secrecy to our own law enforcement and national defense efforts, and keeping ourselves from connecting the dots. When we keep our citizens in the dark, then we as citizens can neither protect ourselves nor pitch in to protect others – the way those passengers on Flight 93 stormed the cockpit and saved lives right here on Capitol Hill.

To fix the problem we're facing at the National Archives, not just over-classification but over-re-classification, we will need to do more than just applaud the national declassification initiative that Archivist Alan Weinstein and ISOO director William Leonard are recommending. They are exactly right that continuing the current agency-centric approach to declassifying historic records is a recipe for more inefficiency and more inappropriate classification.

We do have some best practices we can call on for lessons about how to do it right. Look at the tremendous successes we have seen with the Nazi War Crimes Interagency Working Group, and the Kennedy Assassination Records Review Board. Those efforts succeeded in lifting the cold, dead bureaucratic hand from historic records for three reasons:
1. They had a law behind them that clearly stated the goal, release of these historic records.
2. They had an audit board, independent and nonpartisan, that held the agencies' feet to the fire.
3. They had a different standard of review for intelligence documents, one in which the undefined phrase "sources and methods" which comes from the 1947 National Security Act did not trump all the other governmental and public interests in these records.

We can replicate these successes in the new Declassification Initiative, as long as that effort has the resources to bring all the agencies to the table. Congress needs to authorize, for all classified documents more than 25 years old (the time period given in President Bush's Executive Order after which the threat of automatic declassification looms), new standards of review like those that worked for the Kennedy assassination records and for the Nazi War Crimes documents. The latter included the only CIA names files that have ever been declassified, I should note, with absolutely no damage to U.S. national security. And those files dated back to the 1940s and 1950s, just like the documents that we now know have been shoved back into the vaults.

I thank you for your attention, Mr. Chairman and members of the Subcommittee, and I welcome your questions.